No. 230.

Br. of Brown & McLaughlin
(17,689.)

McLaughlin for D. C. Con mo

FEB 23 1901
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

Filed Feb. 23, 1901.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

MOTION TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT IN SUPPORT OF SAME.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

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No. 230.

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PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Motion to Dismiss or Affirm.

Now comes the defendant in error herein, by Charles W Brown, Daniel McLaughlin and William L. McLaughlin, his counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of the supreme court of one of the United States, to-wit: The supreme court of the state of South Dakota; and it appears from the record in this case:

1. That the said plaintiffs in error did not specially set up or claim any title, right, privilege or immunity under the constitution or any treaty or statute of the United States.

2. That in the assignment of errors no reference is made to any statute of the United States under which the plaintiffs in error claim any title or right, and said assignments of error are therefore insufficient.

3. That the supreme court of the state of South Dakota based its decision upon grounds independent of any federal question.

4. That as to the right to locate a lode claim within the limits of a placer claim previously located, and the rights acquired

by the patenting of a placer claim, the supreme ourt of the state of South Dakota, based its decision upon the fact that plaintiffs were estopped to deny the validity of the Tin Bar No. 1 and Tin Bar No. 2 claims.

5. That as to the right of one cotenant to relocate the common property, the supreme court of the state of South Dakota based its decision, not on any construction of any federal statute, but on the general principles of the law of cotenancy.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which the said writ of error purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said appeal was taken for delay only.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

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Plaintiffs in Error.

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PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Notice of Submission of Motion to Dismiss or Affirm.

To James W. Fowler, Fred H. Whitfield and Charles Quarles, Counsel for Plaintiffs in Error.

PLEASE TAKE NOTICE, that on Monday, the 11th day of March, 1901, at the opening of the court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motion.

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.

(17,689.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

Brief on Motion to Dismiss or Affirm.

Statement of Facts.

This action was commenced in the circuit court of Pennington county, South Dakota, by the defendant in error, Patrick B. McCarthy, to determine an adverse claim asserted by William B. Franklin, Thomas C. Blair, Albert Amsbury and John J. Fayel to an undivided one quarter interest in and to the Holy Terror and Keystone No. 4 lode claims, situated in Cross Mining District, Pennington county, South Dakota. Before the trial William B. Franklin died, and his administrator, Edward W. Speed, was substituted as a defendant.

On the trial the plaintiff abandoned his claim to a quarter interest in said lodes, and asserted title to an undivided one-eighth interest only.

The facts found by the trial court were as follows:

"On September 6, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed Placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious and peaceable possession of the claim, were acknowledged and reputed to be its owners, and

during each year performed the required development work. They applied for patent November 23, 18[illegible]. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888. Reed, Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon and within sixty days thereafter recorded a location certificate, but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed Placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889 and about four days' work in 1891; such work not exceeding $14 in each of those years. There was no agreement on the part of the defendants, Blair or Franklin, with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed, or improvements made, upon Tin Bar No. 2, except about four days work in 1891, of value not exceeding $14. There was no agreement on the part of defendants, Franklin and Blair, with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893 or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendan s are the owners of the Holy Terror and Keystone No 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No 1 or 2 to the application for patent to the Reed Placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one, George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton

conveyed an undivided one-fourth interest in Tin Bar No. 2 to Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin (since deceased) and defendants, Blair, Fayel and Amsbury, each owned an undivided one-fourth interest in the Holy Terror claim, and an undivided seven thirty-sixths interest in Keystone No 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed Placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until during the trial of this action in the Court below." (Trans. pp. 34 and 35)

The only difference between the Tin Bar No. 1 lode and the Tin Bar No. 2 lode so far as the questions of law are concerned, is that the point of discovery on the Tin Bar No. 2 lode was outside of the limits of the Reed Placer claim, and the point of discovery on the Tin Bar No. 1 was inside the limits of the Reed Placer claim.

Upon the trial in the circuit court of Pennington county, judgment was entered for the defendants upon the facts found by the court. (Trans. p. 27.)

From this judgment and the order denying the motion for a new trial, plaintiff appealed to the supreme court of the state of South Dakota. Upon the hearing in that court the judgment was reversed and a new trial ordered. (Trans p. 34.)

McCarthy v. Speed, 77 N. W. 590; 11 S. D. 362.

A rehearing having been ordered, the supreme court held that, as the order denying the motion for a new trial had not been entered at the time the appeal was taken, the court could consider only the errors apparent in the judgment roll, and modified its former opinion by ordering judgment entered for the plaintiff upon the findings of fact made by the trial court. (Trans. p. 40.)

McCarthy v. Speed, 80 N. W. 135; 12 S. D. 7

John J. Fayel, having died while the appeal was pending, his heirs and representatives and the heirs of William B. Franklin were brought in as defendants, and judgment was finally entered in the circuit court of Pennington county, South Dakota, in favor of plaintiff on January 13, 1900. (Trans. p. 44.)

Defendants on the first day of February, 1900, sued out a writ of error to said circuit court under § 709, Rev. Stat. U. S. to

have this judgment reviewed in the Supreme Court of the United States.

Defendant in error now moves to dismiss or affirm upon the following grounds:

1. That said plaintiffs in error did not specially set up or claim any title, right, privilege or immunity under the constitution, or any treaty, or statute of the United States.

2. In the assignment of errors no reference is made to any statute of the United States under which the plaintiffs in error claimed any title or right, and said assignments of error are therefore insufficient.

3. The supreme court of the State of South Dakota based its decision upon grounds independent of any federal question.

4. As to the right to locate a lode claim within the limits of a placer claim previously located, and the rights acquired by the patenting of a placer claim, the supreme court of the state of South Dakota based its decision upon the fact, that plaintiffs were estopped to deny the validity of the Tin Bar No. 1 and Tin Bar No. 2 claims.

5. As to the right of one cotenant to relocate the common property, the supreme court of the state of South Dakota based its decision, not on any construction of any federal statute, but on the general principles of the law of cotenancy.

Argument.

I.

In the amended answer of the plaintiffs in error they claimed upon information and belief, that the defendant in error intended to set up certain rights under and by virtue of the Tin Bar No. 1 and Tin Bar No. 2 claims, but asserted that said claims were abandoned and forfeited before the location of the Holy Terror and Keystone No. 4 claims. (Trans. p. 17.)

This is the only thing in the record, except the assignments of error, which may in any way be construed as specially setting up any title or right under the statutes of the United States, and it is not setting up the claim of plaintiffs in error but that of defendant in error.

In Florida Central and Peninsular R. Co. v. Bell, 176 U. S. 321 this court said at page 329:

"It has been several times held by this court that the plaintiff,

if the statement of his own claim does not disclose a federal question, cannot create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States."

State of Tennessee v. Union of Planters Bank, 152 U. S. 454
Metcalf v. City of Watertown, 128 U. S. 586.
Chappell v. Waterworth, 155 U. S. 102.
East Lake Land Co. vs. Brown, 155 U. S., 488;
Oregon S. L. & U. N. R. Co. vs. Skottowe, 162 U. S. 490

In the case at bar, of course, no question of jurisdiction arose, but the principle is the same. The defendants below did not assert that their rights arose under any statute of the United States, or that the decision of the issues involved any question of the construction or applicability of any statute of the United States, and they could not, by asserting what the plaintiff below intended to prove, import a question into the record which might be claimed to give them a right to sue out a writ of error from the Supreme Court of the United States.

II.

The assignments of error in this case do not show what right or title was specially set up and claimed by defendants below, nor do they specify under what statute of the United States they now make any claim. The Court is allowed to make out for itself, if it can, what errors defendants below claim were committed, and what statute defendants' rights are supposed to be based on.

Oxley Stave Co. v. County of Butler 166 U. S., 648, this Court said:

"The words 'specially set up or claimed' imply that if a party intends to invoke, for the protection of his rights, the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare, 'specially,' that is unmistakably, this Court is without authority to re-examine the final judgment of the state court."

Maxwell v. Newbold, 18 How. 511.
Crowell v. Randell, 10 Peters, 368.
Hoyt v. Thompson, 1 Black, 518.
Sayward v. Denny, 158 U. S., 180.
Chicago & N. W. R. Co. v. Chicago, 164 U. S., 454.

III.

We shall group the last three grounds of the motion together, and believe that it should be granted because of those grounds.

The Supreme Court of the United States will not entertain jurisdiction of state judgments where, besides the federal ques-

tion decided by the state court, there is another and distinct ground on which the judgment can be sustained.

Kennebec & P. R. Co. v. Portland & K. R. Co., 14 Wall. 23.
Rector v. Ashley, 6 Wall, 142.
Gibson v. Chouteau, 8 Wall, 314.
Klinger v. Missouri, 13 Wall., 257.
Eustis v. Bolles, 150 U. S., 361.
Missouri Pacific R. Co. v. Fitzgerald, 160 U. S., 556.
Bacon v. Texas, 163 U. S., 207.
Egan v. Hart, 165 U. S. 188.
Castillo v. McConnico, 168 U. S., 674.
Chemical Nat'l Bank v. City Bank, 160 U. S., 646.
Sherman v. Grinnell, 144 U. S., 198.
Wade v. Lawder, 165 U. S., 624.
Harrison v. Morton, 171 U. S., 38.
Pierce v. Somerset Ry., 171 U. S., 641.
Chappell Chem. & F. Co. v. Sulphur Mines Co., 172 U. S., 465.
Roby v. Colehour, 146 U. S., 153.
De Lamar's Nevada G. M. Co. v. Nesbitt, 177 U. S., 523.
Weyerhaueser v. Minnesota, 176 U. S., 550.
Moran v. Horsky, 178 U. S., 205.
Pittsburg & L. A. Iron Co. v. Cleveland Iron Min. Co., 178 U. S., 270.

In this last case this Court said:

"It is manifest that the supreme court rested its decision on the grounds: (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff in asserting its claim, whereby the *status quo* could not be restored.

"It requires no argument to demonstrate that neither of these grounds involves a federal question. But plaintiff in error contends that they were all made to depend upon a federal question, which the court erroneously decided, and therefore that they necessarily involve such question, * * * * * But again, and whatever the error in that conclusion (we do not assert there was any) the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment."

In Moran vs. Harsky, *supra*, this court held that the defense of laches was an independent ground sufficient to sustain the judgment of the supreme court of Montana, even though a federal question was involved.

In Seeberger vs. McCormick, 175 U. S., 274, this court said:

"It has frequently been held that the contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give us jurisdiction to review the judgment of the supreme court of a state where that judgment was

based upon a doctrine of general law sufficient of itself to determine the case"

The court quoted besides some of the cases cited above:

Beaupre v. Noyes, 138 U. S., 397.
Remington Paper Co. v. Watson, 173 U. S., 443.

In this case the federal questions which the plaintiffs in error attempt to rely on are three:

1. The discovery of the Tin Bar No. 1 lode being within the limits of the Reed Placer claim, which was previously located, said Tin Bar No. 1 lode never had any validity.

2. The discovery of the Tin Bar No. 1 lode being within the limits of the Reed Placer claim as patented, the Tin Bar No. 1 lode became void.

3. William B. Franklin, although a co-tenant with Patrick B. McCarthy in the Tin Bar No. 1 and Tin Bar No. 2 lodes, could relocate said lodes in his own name so as to exclude McCarthy from any interest in the relocated ground.

We say that the decision of the supreme court of the state of South Dakota on the first two propositions is based upon the doctrine of estoppel, and on the third proposition, upon the general principles of cotenancy. If this is true, then the writ of error should be dismissed.

Upon the first two propositions the South Dakota supreme court says:

"However this may be with respect to strangers, there is certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim. Under such circumstances it would hardly be logical to regard the placer owner as a trespasser upon his own premises, and, as we shall attempt to show hereafter, the defendants are estopped from questioning the validity of the Tin Bar claims to the injury of plaintiff.

"We think the learned circuit court erred in concluding that the Tin Bar No. 1 claim was invalid in its inception because its point of discovery was within the boundaries of the placer claim. If the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patent *Noyes v. Mantle*, 127 *U. S.*, 348, 8 *Sup. Ct. Rep.*, 1132; *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 *U. S.*, 394, 12 *Sup. Ct. Rep.*, 543. As to what constitutes a discovery within the meaning of the federal statutes has caused the courts no little trouble.

It might be difficult to determine, in this case, from the findings of the trial court, whether any discovery was ever made upon either Tin Bar claim; but are these defendants in position to allege or prove, as against the plaintiff, that the declarations contained in the recorded location certificates were false, and that no discoveries were, in fact, ever made? We think not. Can the locators of these claims be heard to contradict their own recorded representations, to the injury of this plaintiff? It is disclosed be the evidence that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration, after an examination of thy records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims. Where one, by his conduct, intentionally causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, the former is estopped from averring against the latter the existence of a different state of facts at the same time. The locators of these claims with actual knowledge of the facts, caused location certificates to be recorded, thereby representing that discoveries had been made on each, with the expectation and intention of inducing persons who might examine the records to believe that they were the owners of properly located mining claims. This conduct produced intended results. They sold an interest in the claims. Plaintiff examined the records, was induced to believe that the claims had been legally located, and acted on such belief. Whatever rights he has in this action depend upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations" (Trans. pp. 36, 37)

On the petition for a rehearing the Court said:

"It now appears that we cannot consider the evidence, and must base our decision upon the facts found by the court below. Its findings show that Reed, Franklin, Blair and Eaton recorded a location certificate for Tin Bar No. 1, and that Blair and Eaton recorded a location certificate for Tin Bar No. 2, in the office of the register of deeds in the proper county, before plaintiff purchased his interest in such claims; that neither defendant is in any better position than the original locators; and, whether or not plaintiff examined and relied upon the records, we think defendants are estopped from denying the validity of these locations."

If the trial court had sustained an objection to all the evidence as to the discovery of the Tin Bar No. 1 lode and the lines of the Reed Placer claim, upon the ground that plaintiffs in error were estopped from asserting the invalidity of the Tin Bar No. 1

lode, such exclusion of evidence would not have justified suing out a writ of error.

Sayward v. Denny, 158 U. S., 180.

Here in both of its opinions the supreme court of South Dakota bases its decision on the first two propositions squarely on the ground of estoppel, and hence this court is precluded by its decisions from passing upon the alleged federal questions.

In Weyerhaueser v. Minnesota, *supra*, this court said:

"Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no federal question"

As to the third proposition the supreme court of South Dakota says:

"It being determined that, for the purposes of this action, the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment work has not been done upon a mining claim, one cotenant therein can relocate the same, and obtain title thereto, not only as against the world, but as against his cotenants. We are not aware that the precise question here presented has ever been decided by any court of last resort. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position. *Venable v. Beauchamp*, 3 *Dana*, 321. It has been applied to mining property by the federal supreme court. In a case in that court, where one had acquired an interest in an unpatented claim by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his cotenant; that a court of equity would enforce the trust; and that the excluded cotenant was not required to adverse the application for patent. *Turner v. Sawyer*, 150 *U. S.*, 578, 14 *Sup. Ct. Rep.*, 192. Therefore the only question to be determined in this connection is whether the relation of cotenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims. 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent.' *Belk v. Meagher*, 104 *U. S.* 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with

a view to the location thereof. *Belk v. Meagher*, 104 *U. S.* 279. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 *Lindley, Mines*, 644; *U. S. Rev. Stat.*, § 2324. Plaintiff and Franklin continued to be cotenants so long as the Tin Bar claims continued to exist. They continued to exist until the ground was relocated, and during every instant of that time the latter was, in law, incapable of performing any act in hostility to his cotenant in reference to the joint estate. Franklin was plaintiff's cotenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was hostile to his cotenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his cotenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but, if he elected to act at all, he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his cotenant, in hostility to his interests, and, if they were not done for that purpose, they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements 'the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' *U. S. Rev. Stat.*, § 2324. It is contended that, if congress intended to have the relocator regarded as a trustee under any circumstaces such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute. If such relation exists between an original locator and another, and he secures a patent, no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocator sustains such relation to a third person, the latter's rights may be enforced in equity. If this be true, there is no reason for making a different rule as to cotenants. The relocator is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relations to another who may be a cotenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this

character the trust depends upon the relation of the parties, not upon the manner in which title is acquired." (Trans. pp. 37, 38 and 39.)

Here is a clear and definite declaration that the rights of defendant in error flow not from any construction or application of § 2324, Rev. Stat. U. S. to the facts of the case, but from the relation of the parties. "The trust results from the fiduciary relation of the parties, and not from the operation of the statute." And to make their meaning more clear they say: "This conclusion is not *precluded* by the language of the federal statutes." In other words, if the supreme court had said: "We base this decision upon general principles of law and not upon any construction or applicability of § 2324," their meaning would have been no plainer than it is with the language which they did use.

In Eustis v. Bolles, *supra*, this court said:

"It is likewise settled law that where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

If we apply this principle here, the motion to dismiss or affirm should be granted. The first two questions attempted to be assigned as error by the plaintiffs in error are disposed of upon the question of estoppel. The third question, the right of a cotenant in a mining claim to relocate the ground and exclude his former coowners from any ownership therein, is disposed of on the general principles of the law of cotenancy, not by the construction or applicability of § 2324. The supreme court of South Dakota mentions the statute only to show that its language does not *preclude* the doctrine which they derive from the law of cotenancy.

Respectfully submitted,

CHARLES W. BROWN,
DANIEL McLAUGHLIN,
WILLIAM L. McLAUGHLIN,
Counsel for Defendant in Error.